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Abstracts of Recent Cases

corroboration before admitting extra-judicial confessions, many jurisdictions leave the order of proof entirely to the discretion of the trial court.[58] Other courts have announced that the corroboration should be submitted first,[59] but no case has been found reversing a conviction because the order of proof had been disregarded.[60] Once the confession is admitted it may be considered along with the other evidence as proof that a crime was committed;[61] thus the strongest evidence of guilt need not be kept separate from the proof of the corpus delicti. In nearly every jurisdiction circumstantial evidence may be used as corroboration of confessions.[62]

[58] *Ibid.*; Adolfson v. United States, 159 F.2d 883, 888 (9th Cir. 1947); Watts v. State, 229 Ind. 80, 95 N.E.2d 570 (1950).

[59] Note, People v. Grimes, 91 Cal. App.2d 629, 205 P.2d 416 (1949); People v. Porter, 269 Mich. 284, 257 N.W. 705 (1934) (although admissions as distinguished from confessions need not be corroborated first). Note, *Evidence-Corpus Delicti*, 17 TEMP. L. Q. 189 (1943).

[60] Although there appears to be a conflict in these views, it is likely that the courts that have stated the stricter rule will back down when the issue is squarely presented. They will probably follow the lead of the decisions that emphasize that it would be more appropriate to have confessions introduced after the other evidence, but hold that any error is cured by the subsequent corroboration. People v. Durfee, 79 Cal. App. 2d 632, 180 P.2d 373 (1947); Anthony v. State, 44 Fla. 1, 32 So. 818 (1902); Ashby v. State, 124 Tenn. 684, 139 S.W. 872 (1911).

[61] Parker v. State, 228 Ind. 1, 88 N.E.2d 556 (1949); Pope v. State, 158 Miss. 794, 131 So. 264 (1930).

CONCLUSION

Proving the corpus delicti in arson cases presents special problems because of the lack of sufficient evidence that survives the fire and because arson is one crime for which the presumption of accidental loss is uniquely appropriate. Careful investigation with full knowledge of the type of evidence that is frequently used and considered legally competent can uncover much that is not apparent at first sight. The courts appreciate the problems involved in finding proof of an intentional fire and permit a wide range of evidence to be used to establish it. Furthermore, there are few restrictions that apply particularly to the corpus delicti to limit the presentation of a case. While the leniency of courts in admitting evidence increases the risk of conviction when no crime has been committed, the danger can be minimized by the exercise of caution in judging the sufficiency of proof. This caution, however, should not require the use of artificial rules.

[62] Note, *Proof of the Corpus Delicti by Circumstantial Evidence*, 4 TEMP. L. Q. 79 (1929); People v. Borelli, 392 Ill. 481, 64 N.E.2d 719 (1946); Warke v. Commonwealth, 279 Ky. 659, 180 S.W.2d 876 (1944).

ABSTRACTS OF RECENT CASES

Army Court-Martial's Use of Body Fluid Taken from Soldier while Unconscious Does Not Violate Due Process or the Privilege Against Self-Incrimination—The United States Court of Military Appeals has ruled that the privilege against self-incrimination does not prohibit the use of a urine specimen obtained from a soldier by catheterization while he was unconscious. *United States v. Williamson*, 4 U.S.C.M.A. 320 (1954). The distinction is made that the privilege applies only when "active and conscious use of the mental facilities" are utilized. Thus the decision adopts the majority view of the state courts, although the federal decisions reveal no clear answer. The court disposes of *Rochin v. California*, 342 U.S 165 (1952) (extraction of fluid by stomach pump held violative of the Fourteenth Amendment) by limiting it to cases where the methods of obtaining the evidence "offend against canons of decency and fairness." The fact that the Model Code of Evidence would permit the procedure of the instant case is relied upon by the court as one indication of fairness. The opinion is silent as to whether the urine specimens were taken for purposes of

diagnosis or evidence. If the only purpose were the former, a possible physician-patient privilege might be in issue.

Coercion Invalidating First Confession Carries Over to Confessions Immediately Following—In a state prosecution for murder of his parents, the defendant was subject to days and nights of intensive police questioning. Then a state-employed psychiatrist, whom the defendant believed was to treat him for an acute attack of sinus, induced a confession while police listened through concealed microphones. This confession was immediately followed by additional confessions given in rapid succession to a police officer, defendant's business partner, and state prosecutors. The highest state court reversed a conviction on the ground that the confession made to the psychiatrist had been extorted by coercion. At a second trial only the other confessions were used. Defendant objected to the admission of these other confessions on the ground that they were also obtained by coercion and promises of leniency, but the trial court submitted to the jury the question of their "voluntariness". Defendant was again convicted, the death penalty imposed, and his conviction affirmed. The case came before the Supreme Court of the United States after his habeas corpus petition was denied by two lower federal courts.

Five members of the Supreme Court, in an opinion by Justice Black, granted relief, *Leyra v. Denno*, 74 Sup. Ct. 716 (1954), holding that the coercive character of the first confession carried over to subsequent ones, all being parts of one continuous process. The Court cites the long line of cases establishing that the use in a state criminal trial of a defendant's confession obtained by coercion—whether physical or mental—is forbidden by the Fourteenth Amendment. As to whether the confessions were so coerced, the Court states, "an already physically and emotionally exhausted suspect's ability to resist interrogation was broken to almost trance-like submission by use of the arts of a highly skilled psychiatrist." Justices Minton, Reed, and Burton dissented. They reasoned that while there is a presumption that the coercion persisted so as to influence subsequent confessions, it can be rebutted by various circumstances, and that an invalid confession does not ipso facto invalidate all subsequent confessions as a matter of law. The dissenters concluded that it was the very essence of due process to submit the question of "voluntariness" to the jury.

Disagreement as to Whether a Recording Made by a Party to Telephone Call Violates Federal Wire-Tapping Statute—Two judges of the Federal District Court for the District of Columbia came to opposite conclusions as to the scope of the Federal Communication Act. Section 605 of the Act provides that "no person not being authorized by the sender shall intercept any communication and divulge or publish its contents." In *United States v. Stephenson*, 121 F. Supp. 274 (D.D.C. 1954), it was held that "no person" includes one of the participants in the telephone conversation and that the consent of the "sender" is not obtained until both parties authorize the recording. In *United States v. Sullivan*, 116 F. Supp. 480 (D.D.C. 1953), decided only a few months before, the court ruled that the consent of one participant is enough to legalize a wire tap.

One Convicted of Unlawfully Possessing Illegal Instrumentalities May Not Have Sufficient Interest Therein to Raise Question of Unlawful Search and Seizure—Defendant, president and manager of an incorporated social club, was convicted of unlawfully possessing slot machines. The machines were the property of the club. A timely motion was denied to suppress their admission as evidence on the ground that they had been illegally seized in violation of the United States and Illinois Constitutions. On appeal, held affirmed. *People v. Perry*, 1 Ill. 2d. 482, 116 N.E. 2d 360 (1953). Since the so-called "federal exclusionary rule" (which Illinois and a majority of the states follow) is based upon the constitutional privilege against self-incrimination, the courts

have held that it is available only to one whose constitutional rights have, in fact, been invaded. The court concluded that while the search might be illegal as to the corporation, it was not to the defendant. The court found no paradox in the fact that the defendant "could be so far in possession of the machines as to be charged with illegally possessing them and yet not have such an interest as would enable him to cause their exclusion." Federal cases expressing the same view and relied upon by the Illinois Supreme Court are *United States v. DeVasto*, 52 F. 2d 26 (2d. Cir. 1931); *Kelley v. United States*, 61 F.2d 843 (8th Cir. 1932).

Statements Made by Defendant to Senate Committee Counsel are Admissible in Evidence—Federal Criminal Code Section 3486, barring use in criminal proceedings of defendant's testimony "before any committee" of Congress, does not bar use of statements made by defendant voluntarily to Senate Committee's counsel. *United States v. Brennan*, 22 U.S.L. Week 2591 (May 27, 1954). The court, although recognizing that the committee counsel was acting as an arm of the committee, held that the statements were not made "before any committee." Even though it was assumed that the counsel was acting on behalf of the committee at the time the information was divulged, the court noted that a refusal by the defendant to give the information would not have subjected him to contempt charges.

Right to Public Trial Violated by Exclusion of Public and Press—Exclusion of public and press violated New York Statutes guaranteeing the accused a public trial, ruled the court in reversing a prosecution for compulsory prostitution. *People v. Jelke*, 22 U.S.L. Week 2575 (May 18, 1954). The Sixth Amendment was held not applicable. The court recognized the inherent right of a judge to control the conduct of the trial, but held this did not justify excluding spectators on the ground that the case had been over-publicized. It was deemed particularly prejudicial that the trial was closed for the presentation of the state's case and open when the defendant's side testified. Thus a witness would be shielded from publicity if testifying for the prosecution but be in the "pitiless glare of press and public" if a witness for the defense. Two justices dissented, expressing the view that the ruling deprived a trial court of the power to prevent itself from being a source of filthy news; and that the permission to have a reasonable number of friends and relatives present satisfied the right to a public trial.

Attorney Who Represented Client During Period when Latter Was Pursuing a Career of Crime May Not Invoke Attorney-Client Privilege—The attorney-client privilege is based on the need for private communication between attorney and client without fear of disclosure. The privilege is personal to the client and only he may waive it. Moreover, an attorney called as a witness must assert the privilege if applicable. The New Jersey Supreme Court ruled that a grand jury may compel an attorney to name bribed officials revealed to him by a deceased racketeer. The court adopts the view advanced by the Model Code of Evidence in holding that where the client consults the attorney in furtherance of criminal activities no privilege exists. *In Re Selser*, 105 A. 2d 395 (N.J. 1954). This is true whether or not the attorney is aware of his client's purposes. Since the privilege is without constitutional sanction it is even more properly limited beyond its legitimate purposes. The opinion quotes from *Clark v. United States*, 289 U.S. 1 (1933), to the effect that there must be some prima facie evidence of the illegal nature of the attorney-client meetings to warrant withdrawal of the privilege. After stating that such determination is for the court rather than for the attorney, the New Jersey Court points to the more than 200 meetings at a time when the client was bribing public officials as constituting this prima facie evidence. Three justices dissented on the ground that there was no evidence that advice in aid

of future wrongdoing was given, and that only past acts were involved.

New Insanity Tests—The New Mexico Supreme Court has adopted the "irresistible impulse" test as a third category which will constitute the defense of insanity. Under the widely accepted M'Naghten rule only the inability to distinguish between right and wrong, or not being able to comprehend the nature and quality of his act excused a defendant. The court holds a good defense exists if the defendant can show he was suffering from a mental disease which made him incapable of preventing himself from committing the crime, even if he knew the nature and quality of his act and that it was wrong. *State v. White*, 270 P. 2d 727 (N.M. 1954). This view has been approved by only a small minority of the states. The court cautions, however, that it recognizes only a "true disease of the mind . . . as distinguished from a sort of momentary insanity arising from the pressure of circumstances."

The Court of Appeals for the District of Columbia has gone further. In 1929 the court had recognized the "irresistible impulse" test in addition to the M'Naghten rule; and in *Durham v. United States*, 23 U.S.L. Week 1001 (July 1, 1954), it was held that a defendant established the defense of insanity if he proves simply that his unlawful act was the product of a mental disease or mental defect. Thus if some evidence of insanity is presented, the jury must be instructed to acquit unless it is convinced beyond a reasonable doubt that either the defendant did not suffer from a disease or defective mental condition at the time of the act, or that the act was not the product of this condition. New Hampshire is the only other jurisdiction to have a similar rule.